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FIFTY-SEVENTH LEGISLATURE

—————

TWENTY-NINTH LEGISLATIVE DAY
MONDAY, FEBRUARY 9, 2004

Senate Chamber

President Pro Tempore Geddes called the Senate to order at 11:15 a.m.

Roll call showed all members present except Senators Andreason, Gannon, Hill, Pearce and Sweet, absent and excused.

Prayer was offered by Chaplain Don Hardenbrook.

The Pledge of Allegiance was led by Dian Walton, Page.

The Senate advanced to the Third Order of Business.

Reading and Correction of the Journal

Senators Andreason, Gannon, Hill, and Pearce were recorded present at this order of business.

The JUDICIARY AND RULES Committee reports that the Senate Journal of the proceedings of February 6, 2004, was read and approved as corrected.

DARRINGTON, Chairman

There being no objection, the report was adopted and ordered filed in the office of the Secretary of the Senate.

On request by Senator Davis, granted by unanimous consent, the Senate advanced to the Sixth Order of Business.

Reports of Standing Committees

Senator Sweet was recorded present at this order of business.

February 9, 2004

The JUDICIARY AND RULES Committee reports that **S 1285**, **S 1286**, **S 1287**, **SCR 121**, and **SJR 102** have been correctly printed.

DARRINGTON, Chairman

S 1285, **S 1286**, and **S 1287** were referred to the Transportation Committee.

On request by Senator Davis, granted by unanimous consent, **SCR 121** was referred to the Commerce and Human Resources Committee.

SJR 102 was referred to the State Affairs Committee.

February 6, 2004

The JUDICIARY AND RULES Committee reports that **S 1219**, **S 1231**, and **SCR 118** have been correctly enrolled.

DARRINGTON, Chairman

The President Pro Tempore signed Enrolled **S 1219**, **S 1231**, and **SCR 118** and ordered them transmitted to the House for the signature of the Speaker.

February 6, 2004

The JUDICIARY AND RULES Committee reports that Enrolled **S 1213**, **S 1216**, **S 1217**, and **S 1218** were delivered to the Office of the Governor at February 6, 2004 at 4:55 p.m.

DARRINGTON, Chairman

The report was ordered filed in the office of the Secretary of the Senate.

February 6, 2004

The JUDICIARY AND RULES Committee reports out **S 1210**, **S 1227**, and **S 1228** with the recommendation that they do pass.

DARRINGTON, Chairman

S 1210, **S 1227**, and **S 1228** were filed for second reading.

February 6, 2004

The HEALTH AND WELFARE Committee reports it has had under consideration the Gubernatorial appointments listed below and the Committee recommends that said appointments be confirmed by the Senate:

Bruce Zimmerman to the Commission for the Blind and Visually Impaired, term to expire July 1, 2006;

James Solem to the Commission for the Blind and Visually Impaired, term to expire July 1, 2006;

David Hand to the Commission for the Blind and Visually Impaired, term to expire July 1, 2006;

Mark VonLinder to the Hazardous Waste Facility Siting License Application Review Panel;

John "Randy" MacMillan to the Board of Environmental Quality, term to expire July 1, 2007;

Nick Purdy to the Board of Environmental Quality, term to expire July 1, 2007.

BRANDT, Chairman

The Gubernatorial appointments were referred to the Tenth Order of Business, Motions and Resolutions, and ordered held at the Secretary's desk for one legislative day.

February 6, 2004

The JUDICIARY AND RULES Committee reports out **S 1262** with the recommendation that it be referred to the Fourteenth Order of Business for amendment.

DARRINGTON, Chairman

There being no objection, **S 1262** was referred to the Fourteenth Order of Business, General Calendar.

February 6, 2004

Jeannine Wood
Secretary of the Senate
Statehouse Mail

Re: Dissenting Member Report

Dear Madam Secretary:

Enclosed is a member report dissenting in whole or in part with the reasoning and conclusions of both the majority and minority reports from the Senate Judiciary and Rules Committee on the confirmations of J. Philip Reberger and William A. Parsons to the Judicial Council. This report is submitted to be read across the desk and spread upon the pages of the Journal of the Senate pursuant to Senate Rule 21(B).

This dissenting report is relative to the majority report of J. Philip Reberger reported in the Senate Journal on January 28, 2004, and the minority report reported in the Senate Journal on January 29, 2004.

This dissenting report is also relative to the majority report of William A. Parsons reported in the Senate Journal on February 3, 2004, and the minority report reported in the Senate Journal on February 5, 2004.

Sincerely,
/s/ Senator Bart M. Davis
Senate Majority Leader

Senator Burkett objected to the reading of the report and the spreading of the report upon the pages of the Journal.

The President Pro Tempore ruled that Senator Burkett's objection was out of order pursuant to Senate Rule 21(B).

Senator Burkett moved, seconded by Senator Marley, that the decision of the President Pro Tempore be appealed. The question being, "Shall the ruling of the President Pro Tempore be overruled?"

Roll call vote was requested by Senators Burkett, Calabretta, and Stennett.

Roll call resulted as follows:

AYES--Burkett, Calabretta, Kennedy, Malepeai, Marley, Stennett, Werk. Total - 7.

NAYS--Andreason, Bailey, Brandt, Bunderson, Burtenshaw, Cameron, Compton, Darrington, Davis, Gannon, Geddes, Goedde, Hill, Keough, Little, Lodge, McKenzie, McWilliams, Noble, Noh, Pearce, Richardson, Sorensen, Stegner, Sweet, Williams. Total - 26.

Absent and excused--Ingram, Schroeder. Total - 2.

Total - 35.

The President Pro Tempore declared that the motion did not prevail and the ruling was sustained.

Senator Burkett moved, seconded by Senator Kennedy, that the Report of the Members Dissenting in Whole or in Part with the Reasoning and Conclusions of Both the Majority and the Minority Reports not be spread upon the pages of the Senate Journal.

The President Pro Tempore ruled that the motion was out of order pursuant to Senate Rule 21(B).

The following Dissenting Member Report was ordered filed in the office of the Secretary of the Senate and was ordered spread upon the pages of the Journal pursuant to Senate Rule 21(B).

**SENATE JUDICIARY AND RULES COMMITTEE
REPORT OF MEMBERS DISSENTING IN WHOLE OR
IN PART WITH THE REASONING AND
CONCLUSIONS OF BOTH THE MAJORITY AND THE
MINORITY REPORTS—SENATE RULE 21 (B)**

J. PHILIP REBERGER

Majority Report—January 27, 2004

Minority Report—January 29, 2004

WILLIAM A. PARSONS

Majority Report—February 2, 2004

Minority Report—February 3, 2004

The undersigned, Denton Darrington and Bart M. Davis, members of the Senate Judiciary and Rules Committee that considered and recommended the confirmations of J. Philip Reberger and William A. Parsons, hereby submit this report pursuant to Senate Rule 21(B).

Senate Rule 21(B) provides that:

...any member dissenting in whole or part with the reasoning and conclusions of both reports may also present to the Senate a statement of his reasons and conclusions, and all such reports, if decorous in language and respectful to the Senate, shall be entered at length in the Journal.

We dissent in part with the Majority Reports for J. Philip Reberger and William A. Parsons. Our reasons and conclusions

for such dissent are limited to the Majority's singular declaration that "said appointment(s) be confirmed by the Senate." Such recommendations fail to adequately address any of the erroneous legal and factual assertions contained in the Minority Reports of Senators Mike Burkett and Bert Marley. We voted in favor of the confirmation recommendation contained in the Majority Report, and we concur with the Majority in that regard. Our dissent is limited to the failure to report the committee's research in opposition to the Minority Reports' positions.

We dissent in whole with the Minority Reports for J. Philip Reberger and William A. Parsons, filed by Senators Mike Burkett and Bert Marley. Our reasons and conclusions for such dissent are as follows:

J. PHILIP REBERGER

Minority Report—January 29, 2004

I. **ASSERTION THAT APPOINTMENT VIOLATES I.C. § 1-2101.** The Minority Report asserts that the appointment of Mr. Reberger to the Judicial Council violates I.C. § 1-2101 by providing permanent appointed membership of four (4) members from one political party. The Minority Report reaches that conclusion by asserting that Judge N. Randy Smith, J. Philip Reberger, Helen McKinney, and William A. Parsons are all members of the same political party.

We dissent from such assertion. It is undisputed that Messrs. Reberger and Parsons, together with Ms. McKinney, are all members of the same political party. By law, however, Judge N. Randy Smith is nonpartisan. Article VI, Section 7, Idaho Constitution states:

NONPARTISAN SELECTION OF SUPREME AND DISTRICT JUDGES. The selection of justices of the Supreme Court and district judges shall be nonpartisan. The legislature shall provide for their nomination and election, but candidates for the offices of justice of the Supreme Court and district judge shall not be nominated nor endorsed by any political party and their names shall not appear on any political party ticket, nor be accompanied on the ballot by any political party designation.

Further, the Idaho Code of Judicial Conduct Canon 5 prohibits partisan political participation, endorsement, and involvement by judges. Conduct inconsistent with this Canon may be a basis for removal from judicial office.

The Minority Report refers to participation by Judge Smith before ascending to the bench in 1996. The Minority Report only asserts historical partisan participation, without consideration of current nonpartisanship. Senators Burkett and Marley fail to take into account the conceptual difference between "was" and "is."

II. **ASSERTION THAT NOMINEE HOLDS A POSITION OF PROFIT FROM THE STATE OF IDAHO, A DISQUALIFIER UNDER I.C. § 1-2101 (BUILDING AUTHORITY).** The Minority Report asserts that the nominee's service as a member of the Idaho State Building Authority ("ISBA") that pays a \$75 honorarium to attend periodic meetings disqualifies him as a Judicial Council nominee. Also, the

Minority Report speculates that other service to the City of Boise "may" violate the statute. As to the City of Boise, the Minority Report fails to factually report this as a disqualifier, but speculates as to the facts, then makes conjecture therefrom. We dissent in whole with this portion of the Minority Report.

Initially, it is important to note that the Minority Report failed to request an opinion from the Idaho Attorney General; failed to review the Building Authority Statutes; and failed to review existing legal precedent. We did so. As a result, we hereby make this report to the Senate.

We requested that the Attorney General's office review these allegations. In the reply letter dated January 27, 2004, that office reported a member of the Building Authority may simultaneously serve as a member of the Judicial Council. That office's legal opinion concludes no violation of Idaho law. It reported that the Building Authority is not an "office or position under ... the [S]tate" under section 1-2101 because of the unique legal status of the Authority as an independent public body corporate and politic under State law. *See* Idaho Code § 67-6403." That office further reminds the Senate that the ISBA does not receive any state appropriation, and has not since its creation. It is funded exclusively through its leasing agreements. Further, the ISBA Commissioners are not ISBA employees.

The Attorney General's office found no violation of law.

We reviewed the Building Authority Statutes. I.C. § 67-6408 provides:

NO FORFEITURE OF OFFICE. Notwithstanding the provisions of any other law, no officer or employee of this state shall be deemed to have forfeited or shall forfeit his office or employment by reason of his acceptance of membership on the authority or his service thereon.

This language supercedes the Minority Report's asserted limiting language of I.C. § 1-2101. The Minority Report fails to report to the Senate this statutory language or its effect on the allegations the minority asserts.

Finally, we reviewed existing judicial precedent regarding the Minority Report's position. In *Bott v. Idaho State Building Authority*, 122 Idaho 471 (1992), the Idaho Supreme Court held that the Building Authority is not a state agency for purposes of I.C. § 12-117(3). We presume that the Supreme Court's analysis would similarly apply to I.C. § 1-2101.

As a result of the opinion from the Idaho Attorney General, the Building Authority Statutes, and existing legal precedent, it appears that the Minority Report's "position of profit" analysis fails as a matter of law.

III. **ASSERTION THAT NOMINEE HOLDS A POSITION OF PROFIT FROM THE STATE OF IDAHO, A DISQUALIFIER UNDER I.C. § 1-2101 (AIRPORT AUTHORITY AND/OR CAPITOL CITY DEVELOPMENT CORP.).** Additionally, the Minority Report's naked allegations regarding the nominee's involvement with the City of Boise fails simply with the factual denial that he receives any compensation at all. Unlike the Minority, we asked the nominee if he received any compensation. He said he did not. No further analysis is required.

WILLIAM A. PARSONS
Minority Report—February 3, 2004

We adopt by reference the nonpartisan dissent provided in our dissent from the Minority Report for J. Philip Reberger. We assert that as a matter of law, no violation of statute has occurred by the Idaho State Bar in its appointment for confirmation of this nominee. Further, the confirmation by the Senate of this nominee is consistent with Idaho law, as discussed hereinbefore.

History requires the filing of this dissent pursuant to Senate Rule 21 (B).

DATED: FEBRUARY 6, 2004

/s/ DENTON DARRINGTON
CHAIRMAN,
JUDICIARY AND RULES COMMITTEE

/s/ SENATOR BART M. DAVIS
MAJORITY LEADER

On request by Senator Davis, granted by unanimous consent, the Senate advanced to the Eleventh Order of Business.

**Introduction, First Reading, and Reference of Bills,
House Petitions, Resolutions, and Memorials**

S 1288

**BY HEALTH AND WELFARE COMMITTEE
AN ACT**

RELATING TO THE BOARD OF DENTISTRY; AMENDING SECTION 54-903, IDAHO CODE, TO DEFINE "EXTENDED ACCESS ORAL HEALTH CARE PROGRAM"; AND AMENDING SECTION 54-904, IDAHO CODE, TO SPECIFY STANDARDS FOR PRACTICE FOR DENTAL HYGIENISTS.

S 1289

**BY HEALTH AND WELFARE COMMITTEE
AN ACT**

RELATING TO THE IDAHO DENTAL PRACTICE ACT; AMENDING CHAPTER 9, TITLE 54, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 54-935, IDAHO CODE, TO PROVIDE A VOLUNTEER'S LICENSE, TO SPECIFY QUALIFICATIONS, TO GOVERN PERMISSIBLE PRACTICE AND TO PROVIDE IMMUNITY FROM LIABILITY.

S 1290

**BY HEALTH AND WELFARE COMMITTEE
AN ACT**

RELATING TO RECOVERY OF MEDICAL ASSISTANCE; AMENDING SECTION 56-218, IDAHO CODE, TO CLARIFY WHEN MEDICAL ASSISTANCE MAY BE RECOVERED AND TO SPECIFY WHEN THE CAUSE OF ACTION ACCRUES TO VOID A TRANSFER WITHOUT ADEQUATE CONSIDERATION.

S 1291

**BY HEALTH AND WELFARE COMMITTEE
AN ACT**

RELATING TO THE CREATION OF THE IDAHO CONRAD J-1 VISA WAIVER PROGRAM; AMENDING TITLE 39, IDAHO CODE, BY THE ADDITION OF A NEW CHAPTER 61, TITLE 39, IDAHO CODE, TO ADOPT THE IDAHO CONRAD J-1 VISA WAIVER PROGRAM, TO PROVIDE A SHORT TITLE, TO PROVIDE THE PURPOSE OF THE CHAPTER, TO PROVIDE SEVERABILITY, TO PROVIDE

FOR INCORPORATION OF FEDERAL LAW, RULES AND REGULATIONS BY REFERENCE, TO DEFINE TERMS, TO DESCRIBE GENERAL REQUIREMENTS AND LIMITATIONS, TO PROVIDE GUIDING PRINCIPLES, TO DEFINE CRITERIA FOR APPLICANTS, TO DEFINE CONTRACT REQUIREMENTS, TO DEFINE CRITERIA FOR THE PRACTICE LOCATION, TO DEFINE CRITERIA FOR PHYSICIANS, TO DESCRIBE REPORTING REQUIREMENTS, TO REQUIRE AN APPLICATION FEE, TO DESCRIBE APPLICATION CRITERIA AND ACCOMPANYING DOCUMENTS, TO DEFINE CRITERIA FOR FEDERALLY DESIGNATED FACILITIES, TO PROVIDE FOR DEPARTMENT REVIEW AND TO DESCRIBE DEPARTMENT ACTIONS, TO DESCRIBE LIMITATIONS TO PROGRAM PARTICIPATION AND TO DEFINE DEPARTMENT REPORTING REQUIREMENTS.

S 1292

**BY HEALTH AND WELFARE COMMITTEE
AN ACT**

RELATING TO THE BOARD OF DENTISTRY; AMENDING SECTION 54-903, IDAHO CODE, TO PROVIDE THAT A DENTAL ASSISTANT MAY WORK UNDER THE DIRECT, INDIRECT OR GENERAL SUPERVISION OF A DENTIST AND TO REDEFINE "GENERAL SUPERVISION" AND "INDIRECT SUPERVISION" TO INCLUDE THE SUPERVISION OF DENTAL ASSISTANTS.

S 1293

**BY HEALTH AND WELFARE COMMITTEE
AN ACT**

RELATING TO MENTAL HEALTH SERVICES; AMENDING SECTION 39-3129, IDAHO CODE, TO REVISE PETITION REQUIREMENTS FOR REGIONAL MENTAL HEALTH SERVICES AND TO DELETE A REFERENCE TO NOMINATIONS FOR REGIONAL MENTAL HEALTH ADVISORY BOARDS; AMENDING SECTION 39-3130, IDAHO CODE, TO PROVIDE FOR REGIONAL MENTAL HEALTH BOARDS, TO SET FORTH MEMBERSHIP, TO SET FORTH APPOINTING AUTHORITY, TO REQUIRE MEETINGS, TO PROVIDE FOR THE SUBMISSION OF APPOINTMENT LISTS TO THE DEPARTMENT OF HEALTH AND WELFARE AND TO PROVIDE FOR BOARD MEMBERSHIP AS APPLICABLE TO CURRENT MEMBERS OF REGIONAL MENTAL HEALTH ADVISORY BOARDS AND FUTURE APPOINTMENTS; AMENDING SECTION 39-3131, IDAHO CODE, TO REMOVE A REFERENCE TO ADVISORY BOARDS AND TO PROVIDE FOR THE FILLING OF VACANCIES; AMENDING SECTION 39-3132, IDAHO CODE, TO REVISE TERMINOLOGY, TO MAKE GRAMMATICAL CHANGES AND TO SET FORTH ADDITIONAL POWERS AND DUTIES FOR REGIONAL MENTAL HEALTH BOARDS; AND AMENDING CHAPTER 31, TITLE 39, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 39-3134A, IDAHO CODE, TO PROVIDE FOR COOPERATIVE SERVICE PLAN COMPONENTS.

S 1294

**BY HEALTH AND WELFARE COMMITTEE
AN ACT**

RELATING TO ABORTION; AMENDING SECTION 18-604, IDAHO CODE, TO REVISE DEFINITIONS; AMENDING

SECTION 18-605, IDAHO CODE, TO PROVIDE A CAUSE OF ACTION ARISING FROM STATUTE OR OTHERWISE TO A PREGNANT PATIENT OR IMMEDIATE FAMILY MEMBER INJURED BY THE CAUSING OR PERFORMING OF AN ABORTION ON A PREGNANT PATIENT IN VIOLATION OF STATUTE AND TO PROVIDE DAMAGES; REPEALING SECTION 18-609, IDAHO CODE; AMENDING CHAPTER 6, TITLE 18, IDAHO CODE, BY THE ADDITION OF A NEW SECTION 18-609, IDAHO CODE, TO PROVIDE PROCEDURES WHEN ABORTIONS MAY BE PERFORMED AND TO PROVIDE FOR NOTICE; AND PROVIDING SEVERABILITY.

S 1295

**BY RESOURCES AND ENVIRONMENT COMMITTEE
AN ACT**

RELATING TO WATER RIGHT TRANSFERS; AMENDING SECTION 42-222, IDAHO CODE, TO PROVIDE THAT NOTICE OF AN APPLICATION FOR TRANSFER OF A WATER RIGHT SHALL BE MADE IN A MANNER SIMILAR TO THAT PROVIDED FOR APPLICATIONS UNDER SECTION 42-203A, IDAHO CODE, AND TO PROVIDE DISCRETION TO THE DIRECTOR OF THE DEPARTMENT OF WATER RESOURCES IN GIVING NOTICE OF PROPOSED CHANGES TO THE POINT OF DIVERSION OR PLACE OF USE OF A WATER RIGHT THAT DO NOT IMPACT THE HYDROLOGIC SYSTEM OR AFFECT THE RIGHTS OF OTHER WATER USERS.

S 1296

**BY RESOURCES AND ENVIRONMENT COMMITTEE
AN ACT**

RELATING TO GEOTHERMAL RESOURCES; AMENDING SECTION 42-4005, IDAHO CODE, TO PROVIDE THAT THE DIRECTOR SHALL NOT ISSUE A PERMIT FOR GEOTHERMAL RESOURCES IF HE FINDS THAT THE OPERATION OF ANY WELL UNDER A PROPOSED PERMIT WILL DECREASE GROUND WATER IN ANY AQUIFER OR OTHER GROUND WATER SOURCE OR WILL UNREASONABLY DECREASE GROUND WATER AVAILABLE FOR PRIOR WATER RIGHTS IN ANY AQUIFER OR OTHER GROUND WATER SOURCE OF WATER FOR BENEFICIAL USES, OTHER THAN USES AS A MINERAL SOURCE, AN ENERGY SOURCE OR OTHERWISE AS A MATERIAL MEDIUM, UNLESS AND UNTIL THE APPLICANT HAS ALSO OBTAINED A PERMIT FOR THE APPROPRIATION OF GROUND WATERS AND TO MAKE A TECHNICAL CORRECTION.

S 1288, S 1289, S 1290, S 1291, S 1292, S 1293, S 1294, S 1295, and S 1296 were introduced, read the first time at length, and referred to the Judiciary and Rules Committee for printing.

On request by Senator Davis, granted by unanimous consent, the Senate advanced to the Fifteenth Order of Business.

Miscellaneous Business

On motion by Senator Davis, seconded by Senator Stennett, by voice vote the Senate adjourned at 12:25 p.m. until the hour of 11 a.m., Tuesday, February 10, 2004.

ROBERT L. GEDDES, President Pro Tempore

Attest: JEANNINE WOOD, Secretary